IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 07.08.2007

Coram:
The Honourable Mr. Justice V. DHANAPALAN

W.P. Nos.17176 to 17182 of 2007
&
M.P. Nos.1 & 2 in each of the writ petitions

Indo International Limited
represented by its Director
Umraomal Lodha
No.16, Sunkurama Street, I Floor
Chennai - 600 001 Petitioner in W.P. No.17176 of 2007

Rave Global Limited
represented by its Director Rajesh Lodha
No.16, Sunkurama Street, I Floor
Chennai - 600 001 Petitioner in W.P. No.17177 of 2007

Rajesh Lodha Petitioner in W.P. No.17178 of 2007

Ram Abatar Jain Petitioner in W.P. No.17179 of 2007

Umraomal Lodha Petitioner in W.P. No.17180 of 2007

Rajesh Lodha Petitioner in W.P. No.17181 of 2007

Ashu Lodha Petitioner in W.P. No.17182 of 2007

vs.

1 The Assistant Director
Directorate of Enforcement
Shastri Bhawan
III Floor, III Block
26, Haddows Road
Chennai - 600 006

2 The Special Director of Enforcement
Foreign Exchange Management Act
Directorate of Enforcement
Government of India
New Delhi, Adjudicating Authority

3 The Registrar
Appellate Tribunal for Foreign Exchange
Ministry of Law, Justice & Company Affairs
Government of India, Janpath Bhavan
New Delhi - 110 001 Respondents in all the W.Ps.

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Writ Petitions filed under Article 226 of the Constitution of India to issue a writ of certioari seeking to call for the entire records leading to the issue of orders in Appeal Nos.606, 609, 604, 605, 607, 608 and 610 of 2005 respectively dated 14.03.2007 on the file of the third respondent confirming the common order No.SDE/PKD/IV/6/2005 in common File No.T-4/2-M/2004(SCN-II, IV) dated 31.01.2005 on the file of the second respondent made in Complaint No.F.No.T-3/62//SC/C/2002(SK) dated 30.04.2004 on the file of the first respondent and quash the same.

For petitioner in all W.Ps. — Mr. B. Rajendran for Mr. K. Sridhar

For respondents in all W.Ps. — Mr. V.T. Gopalan, Addl. Solicitor General of India for Mr. Patty B. Jagannathan

COMMON ORDER

Since the issues involved in all the seven writ petitions are identical, these writ petitions are decided by this common order.

2 While the petitioners in W.P. Nos.17176 & 17177 of 2007 are companies registered under the Companies Act, 1956, the petitioners in the other five writ petitions are individuals who are none other than the Directors/officials in these two companies.

3 The facts leading to the filing of these writ petitions, in short, are as under:

a Indo International Limited and Rave Global Limited, petitioners in W.P. Nos.17176 and 17177 of 2007 respectively are companies are engaged in export business of leather and other commodities. In the normal course of their business, their Directors and other officials purchased foreign exchange under Liberalized Exchange Rule Management System (in short "LERMS") as per details below and made payment towards the same by way of crossed cheques issued from their bank accounts:

Name of Companies	Travellers Cheques amounting to	Currency amounting to
Indo International Ltd.	US$ 22,07,850	US$ 9,450
Rave Global Limited	US$ 14,11,900	US$ 6,000

b Since the officials of the petitioner Companies were not able to make foreign trips as planned, the petitioner Companies surrendered the foreign exchange purchased as above through authorized money changers in a day or two and also received the

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exchange value of the foreign exchange by means of crossed cheques in their name and in fact, incurring a certain amount as Commission for the aforesaid transactions.

c While so, the petitioners received summons from the first respondent asking them to appear in person in connection with proceedings under the Foreign Exchange Management Act, 1999 (in short "the Act") and to produce the copies of the applications for purchasing the foreign exchange under LERMS and also the details of their financial status. Though the summons were duly replied by the petitioners, the first respondent preferred Complaints against the petitioners in F.No.T-3/62/SZC/2002 (SK) dated 30.04.2004 under Section 16(3) of the Act for the alleged contravention of the provisions of Section 10(6) read with Sections 10(5) and 42(1) of the Act before the second respondent. A detailed reply was submitted by the petitioners stating there has been no violation on their part in respect of the Sections referred to above. However, the second respondent, on an analysis of the facts, by his common order dated 31.01.2005, imposed penalties of Rs.30 lakhs and Rs.20 lakhs on the first and second petitioners respectively .

d Challenging the orders of the second respondent, the petitioners preferred appeals before the third respondent together with applications to waive the pre-deposit of the penalty amounts ordered by the second respondent and the third respondent, by his orders dated 14.03.2007 in the appeals, held that there was no prima facie case made out in the appeals and that the adjudication order of the second respondent is not ex facie bad. Having a look at the sound financial condition of the petitioner companies, the third respondent, further holding that there is no need for any dispensation, rejected the applications for waiver and granted 45 days time from the date of his order i.e. 14.03.2007, for deposit of the penalty amount and made clear that the appeals would stand dismissed in the event of their failure to make such deposit. As against this, the present writ petitions seeking judicial review of the orders of the respondents 2 and 3.

4 The respondents, having reserved their right to file a detailed counter later, have filed their counter in the stay petitions and have contended that the petitioners had neither made out a prima facie case nor even on the question of balance of convenience and that both these issues have been rightly considered by the third respondent while rejecting the applications for waiver and as such, the order of the third respondent, can, in no way be, found fault with.

5 Heard Mr. B. Rajendran, learned counsel appearing for the petitioners and Mr. V.T. Gopalan, learned Additional Solicitor General of India assisted by Mr. Patty B. Jagannathan, learned counsel appearing for the respondents.

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6 The learned counsel appearing for the petitioners has contended that:

a there has been no contravention of Section 10(6) read with Sections 10(5) and 42(1) of the Act in view of the reasons that it was not proved that the petitioners (i) did not use the foreign exchange for the purpose mentioned in the declaration, (ii) did not surrender it to an authorized person within the specified period and (iii) used the foreign exchange for any other purpose for which purchase of foreign exchange is not permissible;

b the confessional statement given by the petitioners cannot be accepted without corroboration and even if the alleged contravention is technical, a huge penalty cannot be imposed and rather a lenient view could have been taken by the second respondent;

c the second respondent ought not to have imposed penalties of Rs.30 lakhs and Rs.20 lakhs particularly after holding that (i) there was no actual loss of foreign exchange; (ii) there was only a technical contravention of the provisions of the Act and (iii) there was no misutilisation of foreign exchange; and

d the third respondent has failed to see that the petitioners had incurred huge loss in business which is reflected in their Balance Sheet and as such, they cannot make the pre-deposit.

7 In support of his contentions, the learned counsel for the petitioner has relied on a judgment of the Supreme Court reported in 2006 (12) SCALE in the matter of Benara Valves Ltd. & Others vs. Commissioner of Central Excise and another (in short "Benara Valves Ltd. case") and the relevant para reads as under:

> "It is true that on merely establishing a prima facie case, interim order of protection should not be passed. But, if on a cursory glace, it appears that the demand raised has no leg to stand, it would be undesirable to require the assessee to pay full or substantive part of the demand. Petitions for stay should not be disposed of in a routine manner (sic) unmindful of the consequences flowing from the order requiring the assessee to deposit full or part of the demand. There can be no rule or part of the demand. There can be no rule of universal application in such matters and the order has to be passed keeping in view the factual scenario involved. Merely because this Court has indicated the principles that does not give a license to the forum/authority to pass an order which cannot be sustained on the touchstone of fairness, legality and public interest. Where denial of interim relief may lead to public mischief, grave irreparable private injury or shake a

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citizen's faith in the impartiality of public administration, interim relief can be given."

8 The learned Additional Solicitor General of India appearing for the respondents, per contra, has contended that the admitted statement has been taken note of by the third respondent and that this statement can be made before the statutory functionaries and such a statement is sufficient for arriving at a finding of violation of the provisions of the Act. He has further contended that from a glance of the Balance Sheet of the petitioner Companies which reflect huge investments being made, it cannot be said that the petitioners are put to any undue hardship requiring dispensation of pre-deposit amount. By relying on paragraphs 11 and 15 of the judgment in Benara Valves Ltd. case, he has pointed out that the third respondent has rightly borne in mind two aspects, viz., undue hardship and the need to safeguard the interest of revenue and had accordingly rejected the applications for waiver filed by the petitioners. In nutshell, it is his vehement contention that there is no illegality or unconstitutionality with the order of the third respondent.

9 I have given due consideration to the rival contentions of the learned counsel on either side.

10 Before proceeding to decide the issue on hand, it would be useful to refer to sub-sections (5) and (6) of Section 10 of the Act which read as under:

> "An authorized person shall, before undertaking any transaction in foreign exchange on behalf of any person, require that person to make such declaration and to give such information as will reasonably satisfy him that the transaction will not involve, and is not designed for the purpose of any contravention or evasion of the provisions of this Act or of any rule, regulation, notification, direction or order made thereunder, and where the said person refuses to comply with any such requirement or makes only unsatisfactory compliance therewith, the authorized person shall refuse in writing to undertake the transaction and shall, if he has reason to believe that any such contravention or evasion as aforesaid is contemplated by the person, report the matter to Reserve Bank.
>
> Any person, other than an authorized person, who has acquired or purchased foreign exchange for any purpose mentioned in the declaration made by him to authorized person under sub-section (5) does not use it for such purpose or does not surrender it to authorized person within the specified period or uses the foreign exchange so acquired or purchased for any other purpose for which purchase or acquisition of foreign exchange is not permissible under the provisions of the Act or the rules or regulations or direction or order

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made thereunder shall be deemed to have committed contravention of the provisions of the Act for the purpose of this Section."

11 From a perusal of the impugned order of the third respondent, it can be seen that only the petitioners' applications for waiver of pre-deposit have been rejected and the petitioners have been given a time-frame of 45 days from 14.03.2007 to make the deposit and admittedly, the appeals are yet to be decided on merits during the hearing by the third respondent on 07.08.2007. The questions raised in this batch of writ petitions can very well be agitated before the third respondent who, in turn, can very well go into the merits of the case and decide the same. For the sake of better comprehension, the observations made by the third respondent in the impugned orders may be divided into two parts and they run as under:

Part I

After hearing both sides with deep consideration, we feel that the appellants do not have a prima facie case. The adjudication order is not ex facie bad, especially when this is more or less admitted in the admissional statement that the foreign exchange is taken for running the business but later resold to another authorized dealer, though purpose of taking foreign exchange is shown as visits abroad.

Part II

The financial condition as shown in the balance sheet also does not permit any dispensation, especially when substantial amount of loan and investment is shown. Therefore, following the judgment of the Supreme Court in M/s. Benara Valves Ltd. vs. CCE 2006 (12) Scale 15, we reject the application for dispensation of the pre-deposit in these appeals and direct the appellant to make pre-deposit of their respective penalties within a period of 45 days from today failing which these appeals will be dismissed on this ground alone. These appeals are fixed for hearing on 7th August 2007.

12 A cursory reading of the above would make it clear that the pre-deposit for considering the appeal has been considered before taking up the appeals on merits. For arriving at a conclusion that there is no undue hardship for the petitioners, the third respondent has taken note of the financial condition as shown in the Balance Sheet of the petitioner companies reflecting huge loans and investments and has rejected the applications for dispensation of pre-deposit. In order to decide whether the third respondent is correct in rejecting the applications of dispensation of pre-deposit, it would be useful to refer to the judgment of the Supreme Court in Benara Valves Ltd. case: (paras 11, 12, 13 and 15)

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"Two significant expressions used in the provisions are "undue hardship to such person" and "safeguard the interests of revenue". Therefore, while dealing with the application, twin requirements of considerations i.e. consideration of undue hardship aspect and imposition of conditions to safeguard the interest of Revenue have to be kept in view.

As noted above there are two important expressions in Section 35(F). One is undue hardship. This is a matter within the special knowledge of the applicant for waiver and has to be established by him. A mere assertion about undue hardship would not be sufficient. It was noted by this Court in S. Vasudeva v. State of Karnataka and others (AIR 1994 SC 923) that under Indian conditions expression "undue hardship" is normally related to economic hardship. "Undue" which means something which is not merited by the conduct of the claimant, or is very much disproportionate to it. Undue hardship is caused when the hardship is not warranted by the circumstances.

For a hardship to be "undue", it must be shown that the particular burden to have to observe or perform the requirement is out of proportion to the nature of the requirement itself and the benefit which the applicant would derive from compliance with it.

The other aspect relates to imposition of condition to safeguard the interest of revenue. This is an aspect which the Tribunal has to bring into focus. It is for the Tribunal to impose such conditions as are deemed proper to safeguard the interest of revenue. Therefore, the Tribunal while dealing with the application has to consider materials to be placed by the assessee relating to undue hardship and also to stipulate condition as required to safeguard the interest of revenue."

13 After giving due consideration to the case of the parties and the ruling of the Supreme Court in Benara Valves Ltd. case, I am of the considered view that as far as the first part of the observation made by the Tribunal in the impugned orders is concerned, such an observation could only be made only after the petitioners make the pre-deposit and as such, the third respondent ought not to have given such an observation, particularly when the appeals are to be taken up on the 7th instant for hearing. In other words, the third respondent, keeping the appeals pending, cannot come to such a conclusion that the petitioners herein do not have a prima facie case and that the adjudication order passed by the second respondent is not ex facie bad. Even assuming that the

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petitioners were prepared to comply with the condition of making the pre-deposit, the appeals will have to be decided on merits, thereafter. Thus, looked at from any angle, the first part of the observation made by the third respondent cannot be sustained and is accordingly set aside.

14 Coming to the second part of the observation of the third respondent, from the proposition of laid down by the Supreme Court in the judgment referred to above, it is clear that the twin aspects of undue hardship and the need to safeguard the interest of revenue are the important criteria to waive the pre-deposit. In the instant case, the power of the third respondent to waive the pre-deposit is mainly based on four aspects, viz., prima facie case, balance of convenience, undue hardship and the need to safeguard the interest of revenue. On a careful perusal of the materials available on record, it is seen that the petitioners have not substantiated their case that they are inflicted with any undue hardship. The term "undue hardship" is normally attributed to economic hardship and for hardship to be "undue", it must be shown that the particular burden to observe or perform the requirement is out of proportion to the nature of the requirement itself and the benefit which the applicant would derive from compliance with it. Undoubtedly, undue hardship is something more than just hardship. In the case on hand, the third respondent has taken note of this aspect and also the aspects of balance of convenience and the need to safeguard the interest of revenue and has rightly rejected the applications for waiver of pre-deposit and this finding of the third respondent is totally in conformity with the settled proposition of law laid down by the Supreme Court in Benara Valves Ltd. case. As such, the second part of the observation made by the third respondent is upheld

15 For all the foregoing reasons, the matter is remitted to the third respondent for consideration afresh upon the petitioners complying with the condition of making the pre-deposit of Rs.30 lakhs and Rs.20 lakhs respectively within a period of two weeks from today and the third respondent is further directed to dispose of the appeals on merits independently and pass appropriate orders thereon as expeditiously as possible.

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In the result, the writ petitions are dismissed except setting aside a portion of the observation made by the third respondent in the impugned orders dated 14.03.2007 as indicated above. No costs. Consequently, connected Miscellaneous Petitions are closed.
Cad

Sd/
Asst.Registrar

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Sub Asst.Registrar

To

1 The Assistant Director
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Shastri Bhawan
III Floor, III Block
26, Haddows Road
Chennai - 600 006

2 The Special Director of Enforcement
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Government of India, Janpath Bhavan
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+ 7cc to Mr. K. Sridhar, Advocate sr no. 49120

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